maintain separate corporate structures for the provision of enhanced services. In lieu of structural separation requirements, the Commission imposed nonstructural safeguards including Open Network Architecture ("ONA") requirements.

The Ninth Circuit Court of Appeals described the *Computer III* regime as follows:

> "In Computer III the FCC ordered the BOCs to develop plans for ONA that would permit enhanced service providers to achieve maximum flexibility in gaining access to telephone transmission facilities thereby allowing them to offer innovative packages of services to consumers. The FCC determined that the open network architecture requirements would be 'self-enforcing in controlling discrimination.' (Cite omitted).
>
> Computer III anticipated that advances in technology would make it possible to achieve what was termed complete 'unbundling' of service components into 'building blocks' that would permit the enhanced service providers to construct their own innovative services as easily as the BOCs. The FCC specified that all basic network capabilities that would be useful in enhanced service applications, 'including signaling, switching, billing, and network management' would be subject to the unbundling requirement. (Cite Omitted). The FCC observed that '[s]uch unbundling is essential to give competing enhanced services providers an opportunity to design offerings that utilize network services in a flexible and economical manner. In essence, competitors will pay only for those Basic Service Elements that they use in providing enhanced services.' (Cite Omitted). This unbundling was intended to permit BOCs' enhanced service competitors to purchase only those elements necessary to a specific type of enhanced service. The network was to be open in order to prevent the BOC s from limiting access, and the unbundled elements were to be tariffed in order to prevent overcharges. (Cite omitted)."[31]

Again, Qwest's Petition as pled does not separately discuss how forbearance from these requirements meets the three-prong test set out in 47 U.S.C. Section 160, nor does it discuss how forbearance from these specific Orders of the Commission would be in the public interest. The Commission should hold forbearance applicants to a standard with respect to forbearance, in which interveners such as the Arizona Commission, are not

[31] California v. FCC, 39 F.3d 919 (1994) at pps. 927-928.

forced to guess as to why Qwest's no longer having to comply with certain provisions is in the public interest. Forbearance petitioners should be required to clearly meet their burden of proof in these cases, given the impact of forbearance on other market participants, or suffer the consequences. This may sound like a harsh result, but it is only fair given what is at stake in most of these cases.

V. Special Access Services

Finally, with regard to Special Access Services, to the extent these are encompassed within Qwest's Petition, the Arizona Commission believes that because the federal Special Access regulations are in a state of flux at this time with several pending dockets, and because recent serious concerns raised by the Government Accounting Office ("GAO") which must be addressed; these regulations are "not fully implemented" to a point where forbearance would be appropriate. For this reason, we do not believe that forbearance of price cap regulations or any of the Dominant Carrier regulations should extend to Special Access Services in any market.

Denial of forbearance relief for special access services is consistent with the Commission's findings in the *ACS II Order and the Omaha Order*. As in ACS II, there is a lack of record evidence regarding the extent to which other competitors provide special access service, particularly those that do not rely on Qwest's tariffed special access services.[32] The Commission also found in *ACS II*, that it was necessary for the Commission to perform its analysis on a more disaggregated geographic basis.[33] The Commission found "[i]n particular, the data submitted do not enable us to conclude that there is sufficient competition with respect to interstate special access services generally, nor to conclude that forbearance would be justified under section 10 notwithstanding our inability to make such a finding."[34] In ACS II, the Commission

[32] See *ACS II* at para. 38.
[33] *ACS II* at para. 35.
[34] *ACS II* at para. 83.

also concluded that "the record suggests that a substantial amount of retail competition is based on special access inputs from ACS."[35]

In the Omaha Order, the Commission also denied the forbearance with respect to special access because it found that Qwest had not provided sufficient data for its service territory for the entire MSA to allow [the Commission] to reach a forbearance determination under section 10(a) for the enterprise market which the Commission in that order took to include all special access services.

Qwest has simply not met its burden of proof that there are any significant alternative sources of wholesale inputs for carriers in the Phoenix study area; or that the alternative sources it offered are true substitutes. Nor does the Arizona Commission believe that any conditions the Commission could impose at this time would be sufficient to satisfy the criteria of section 10.[36]

VI. Section 251(c) and 271 Unbundling Obligations

Finally, Qwest seeks forbearance from the loop and transport unbundling requirements of Sections 251(c) and 271(c)(2)(B)(ii) of the Communications Act, 47 U.S.C. Sections 251(c) and 271(c)(2)(B)(ii).

In the *Omaha Order*, the Commission granted Qwest's Petition in part, and gave Qwest relief from Section 251(c)(3) loop and transport unbundling obligations in nine (9) wire centers in the Omaha MSA based upon the "**actual and potential**" competition which the Commission found is present, or readily could be present, in 100 percent of Qwest's service area in the Omaha MSA.[37]

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[35] *Id.* at para. 84.
[36] *Accord, ACS II*, at para. 86.
[37] *Omaha Order* at para. 57. ("We tailor Qwest's relief to specific thresholds of facilities-based competition from Cox. Specifically, we grant Qwest forbearance from obligations to unbundled loops and transport pursuant to section 251(c)(3) in wire centers where Cox's voice-enabled cable plant covers at least 75% of the end user locations that accessible from that wire center. Our decision today is based on other actual and potential competition, which we find either is present, or readily could be present, in 100 percent of Qwest's service area in the Omaha MSA.").

However, the Commission went on to find that certain key obligations that Qwest is subject to under Section 251(c) and 271(c)(2)(B)(ii) should remain in place even if forbearance from having to provide unbundled access to loop and transport is granted. Those obligations include the obligation to negotiate in good faith the terms and conditions of its Section 251(b) and Section 251(c); to provide other carriers with interconnection to Qwest's network at any technically feasible point; to offer its retail services for resale at avoided-cost wholesale rates; to provide access to UNEs other than loops and transport; to provide reasonable public notice of changes in its network that would affect interoperability; and to satisfy certain collocation obligations.[38] Qwest should not be relieved of these obligations if the Commission decides to grant Qwest forbearance from its loop and transport obligations in any product or geographic market in the Phoenix MSA.

The Arizona Commission opposes Qwest's requests for forbearance of its Section 251(c) and 271(c)(2)(B)(ii) unbundling obligations. We discuss our position on Qwest's below.

A. The TRRO Has Not Been Fully Implemented in Arizona and Therefore Qwest's Petition for Forbearance of its Section 251(c) and 271(c)(2)(B)(ii) Loop and Transport Obligations is Premature

As discussed earlier, the Commission cannot legally grant forbearance from any regulations that have not been fully implemented yet under Section 10(d) of the 1996 [redacted] Act. While the Commission's initial regulations in this area have been fully implemented, its most recent regulations resulting from the TRRO have not been fully implemented in Arizona yet and therefore any discussion regarding forbearance is premature.

[38] *Omaha Order* at para. 57.

Assuming that somehow it is found that Section 251(c) has been fully implemented in Arizona as of this time, Qwest is still not entitled to relief.

B. The Data Supplied By Qwest for Forbearance of its 251(c) Obligations is Deficient

The data supplied by Qwest in support of its Petition is woefully inadequate with respect to this portion of its request. Further, Qwest did not provide any information in its Petition as pled regarding Cox's actual market share per wire center. This alone is reason for denial of Qwest's Petition

The Declaration of Robert H Brigham and David L. Teitzel regarding the status of wholesale telecommunications competition in the Phoenix, Arizona Metropolitan Statistical Area is largely anecdotal. For instance, at one point, they state:

> "For example, AT&T, Covad, Eschelon (which purchased Mountain Telecom in November, 2006), Global Crossing, Granite Telecommunications, Integra, Level 3, McLeodUSA, Time Warner Telecom, Trinsic, Verizon/MCI and XO Communications have all self-reported to the FCC that they are offering "carrier's carrier" services to other telecommunications services providers. Since inter-carrier services are often provided on a contractual basis, details of such services are difficult to obtain. However the presence of numerous providers of such services shows that alternatives to Qwest's wholesale telecom services are readily available in Arizona"

While the Arizona Commission appreciates that Qwest may have difficulty obtaining the specifics of contractual arrangements between its competitors and other whole sale providers, reliance merely upon the presence of other carriers, some of which may offer alternative facilities, is not sufficient. There is nothing provided by Qwest in support of its Petition that could allow the reader to form any opinion as to whether the wholesale services offered are in fact adequate substitutes for the services provided by Qwest pursuant to Section 251(c). Without this type of information, it is virtually impossible to make any type of conclusion about the availability of adequate alternatives.

We note that in the *Omaha Order*, the Commission specifically found

that "[t]he record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market."[39] The Commission went on to state that "[w]e find, however, that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings."[40] Subsequent events strongly suggest that this predictive judgment by the Commission was not valid, as discussed below, and should not form the basis for further grants of forbearance from Section 251(c) ILEC unbundling obligations. We also recognize that the Commission does not rely upon wholesale offerings in making impairment determinations.[41] However, for forbearance purposes, this should be a primary consideration.

Moreover, there is little discussion by Qwest of the TRRO requirements, and how forbearance from those requirements is in the public interest. All in all Qwest has not met its burden of proof with respect to forbearance of unbundling requirements in the Phoenix MSA, and on that basis alone, the Commission should deny Qwest's petition.

C. There Is No Data in Qwest's Petition Supporting any Cost/Benefit Analysis Which Was Relied Upon by the Commission in the *Omaha Order* to Support Forbearance.

In the *Omaha Order*, the Commission relied upon the fact that with the degree of competition in that market, the costs of unbundling outweighed its benefits. While that was a significant finding, there is nothing in this record to support a similar finding. Where the Commission relies upon a cost/benefit analysis, there must be support in the administrative record for the outcome of such an analysis.[42]

Qwest merely states the following in its Petition:

> "First, as the Commission found in Omaha, the costs of the unbundling obligations that Qwest faces in the phoenix MSA outweigh the benefits. Both the Commission and the D.C. Circuit

[39] *Omaha Order* at para. 67.
[40] *Id.*
[41] *See also Omaha Order* at footnote 177.
[42] *See California v. FCC*, 905 F.2d 1217 (1990).

> have recognized the harm to the public interest to competition from excessive unbundling. As the Commission has explained, 'excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.' Similarly the D.C. Circuit has recognized that mandated unbundling 'imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.' Given the extensive facilities-based competition that already exists in the Phoenix MSA, and the potential for even greater facilities-based competition to emerge, any potential benefits from unbundling regulation are slim, while the costs of such regulatory intervention are significant."[43]

But conspicuously absent is any delineation of the specific costs imposed by unbundling to which Qwest refers and any quantification of the potential benefits that Qwest claims are insignificant. Qwest should be required to provide a meaningful cost/benefit analysis particularly where forbearance from Section 251 regulations is at issue.

D. The Commission's Forbearance Determination for Purposes of Section 251(c) and 271(c)(2)(B)(ii) Should be Informed More by a Wholesale Market and TRRO Analysis.

1. The Commission is Putting Far Too Much Weight Upon Actual and Potential Competition in the Retail Market

Should the Commission proceed with Qwest's Petition for forbearance of Section 251(c) and 271(c)(2)(B)(ii) despite the glaring deficiencies with the Petition as pled, the Arizona Commission, as well as many other commenters in this proceeding as well as the Verizon Forbearance proceeding, strongly believe that primary reliance upon the degree of **actual and potential retail** competition provided by the facilities-based cable provider (in this case Cox) to make forbearance determinations with respect to an ILEC's obligations under Section 251(c) and Section 271(c)(2)(B)(ii) is simply inappropriate. The level of retail competition provided by Cox in the various markets (i.e., the degree of retail competition that is not dependent upon UNE access) simply is not the appropriate

[43] Qwest Petition at pps. 28-29.

market data to use to determine whether forbearance from wholesale unbundling obligations is appropriate.[44].

The Commission apparently finds most important the fact that Cox provides service without relying on Qwest's facilities.

> "Most importantly, we find that Cox has been successfully providing local exchange and exchange access services in these wire center service areas without relying on Qwest's loops or transport."

But this fact does not lend itself to a finding that because Cox is able to provide service without reliance upon Qwest, other competitive providers will be able to follow suit. Cox's business model is distinctly different than competitive providers. Cox is and always has been a cable provider first and foremost. Because of its unique nature as a facilities-based cable provider, Cox has a lot of facilities in place that it can build upon to provide telephone service to customers. Other competitive telephone providers, that are not cable providers, do not have this advantage. It simply does not follow that because Cox is able to duplicate Qwest's network, other providers should be able to do so as well.

Similarly the Commission pointed to the mobile wireless services market and the long distance services market, stating that it declined to order unbundling of network elements to provide service in these markets due to the evolution of retail competition that has not relied upon UNE access.[45] While it is true that both of these markets have evolved without reliance upon UNE access, the nature of these markets is considerably different than the cable telephony market or the local exchange market. Neither of these markets has the same substantial barriers to entry that the local exchange market has. Moreover, the Section 251 unbundling regime is only to apply to competitive local exchange providers. The Arizona Commission respectfully requests that the Commission

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[44] *Omaha Order* at para. 64.

[45] *See Omaha Order* at para. 63. See also TRRO, 20 FCC Rcd at 2553, para. 36; 47 C.F.R. Section 51.309(b)("A requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services.")

reevaluate the weight given to the presence of a cable based facilities-provider when making these determinations.

Primary weight should be given to the nature, quality and degree of other wholesale alternatives in the wire center or zip code at issue and the availability of "competitive" wholesale rates; and the factors laid out in the TRRO as discussed below. Importantly, these alternatives and the TRRO criteria, are indeed factors that the Commission said it would consider in any forbearance analysis.[46]

2. Market Analysis Should be Done at the Zip Code Level Where Data is Available and the Business Market Should be Completely Separate from the Mass Market with further Disaggregation into Small, Medium and Large.

In addition, in making its forbearance determinations under Section 251(c), the Arizona Commission once again recommends the use of data at the zip code level to the extent it is available, since it is more accurate with respect to the results produced.

We also strongly recommend that the Business Market in Phoenix be further disaggregated into Small Business, Medium Business and Large Business. This would mean that the Mass Market definition would only include residential customers.

3. The Commission should not Rely Upon "Potential" Competition When Making its Section 251(c) Forbearance Determinations

Additionally, the Commission also puts far too much weight on "potential" competition in its forbearance analysis with respect to Sections 251(c) and 271(c)(2)(B)(ii). The Arizona Commission does not understand why the Commission would give considerable weight to "potential" competition for purposes of granting Qwest forbearance from its unbundling obligations; but on the other hand, consider only

[46] See *Omaha Order* at para. 63 ("Although the Commission's unbundling analysis does not bind our forbearance review, we find it instructive for purposes of rendering our section 10(a) determination.") and para. 67 ("We also examine the role of the wholesale market.").

"actual" competition for its forbearance analysis with respect to Dominant Carrier regulations. We do not believe it is appropriate to consider "potential competition" since there may be reasons why actual competition does not exist in the various markets, but only the potential for competition is present.

E. Forbearance from Loop Unbundling Required Under 251(c) Does Not Meet the Three Prong Test and Is Not in the Public Interest

There has been no evidence presented by Qwest in this proceeding demonstrating that it meets any of the three prongs of the Section 10 of the Act, a necessary prerequisite to obtaining forbearance from its Section 251(c) obligations with respect to the loop. The Commission granted forbearance in the *Omaha Order* in nine wire centers where Qwest faced sufficient **("actual and potential")** facilities-based competition to ensure that the interest of consumers and the goals of the Act were protected under the standards of Section 10(a).

While the Commission has traditionally used a wire center analysis in determining impairment under the TRRO, defining the market down to a zip code level produces the most accurate results. Where requests for forbearance are concerned a zip code geographic market definition should be the preferred approach because of the need for precision. As applied to the Phoenix MSA, the Arizona Commission believes only certain zip codes within the 9 proposed non-impaired wire centers would pass the threshold standard. For example[47]:

- Only 7 of 8 zip codes pass in the REDACTED.
- Only 4 of 9 zip codes pass in the REDACTED.

[47] In a duopoly such as the Commission believes is developing between Cox and Qwest in the residence market, 50% access line gain can reasonably be assumed to equate to 100% access to all customers in a zip code. The comparable coverage that corresponds to the 75% coverage threshold used by the Commission in the *Omaha Order* can, therefore, be assumed to equate to 37.5% access line gain. Applying the 37.5% access line gain to Attachment C yields the following results that pass the 75% coverage threshold. (See the Comments of the Colorado Public Utilities Commission at pages 30-31 for additional discussion.)

- Only 3 of 9 zip codes pass in the REDACTED.
- Only 2 of 8 zip codes pass in the REDACTED.

The above example emphasizes that while some portions of key wire centers may pass the 75% standard, the entire wire center may not.[48] This suggests that the use of wire centers actually gives Qwest relief in geographic areas where it does not meet the three prong test.

The Commission also appeared to recognize that a wire center analysis can be problematic. It stated:

> "Furthermore, as the record confirms, a facilities-based competitor such as Cox that does not compete through reliance on section 251(c)(3) access to unbundled loops is unlikely to pattern the architecture of its network after wire center service area boundaries."[49]

And, in a footnote, the Commission stated:

> "Wire center boundaries do not necessarily follow political or demographic boundaries; do not necessarily correspond to newspapers' circulation boundaries, television or radio reception boundaries or advertising boundaries (whether broadcast or cable); and are not identical to zip code boundaries. Wire center boundaries are most relevant only to the incumbent LEC and competitors that make use of an incumbent LEC's last mile facilities...."

It is also noteworthy that Cox in its Initial Comments pointed to the deficiencies with the use of wire centers where cable companies or other providers are concerned. It stated that "Qwest fails to compare Cox's facilities deployment data to Qwest's wire centers in any meaningful way."[50] Cox went on to state that "[c]onsequently, nothing in the Phoenix Petition would help the Commission determine whether Cox or any other

[48] In the *Omaha Order*, the FCC stated that while its decision relied on competitive factors other than facilities-based competition from Cox, to the extent its decision is based on competition from Cox, it found such competition to be sufficient to justify forbearance in wire center service areas where Cox is wiling and able with a commercially reasonable time of providing service to 75% of end user locations accessible from that wire center. Id. at para. 69.
[49] *Omaha Order* at para. 70.
[50] Cox Comments at ii.

competitor has met the seventy-five percent (75%) facilities deployment threshold the Commission established for forbearance relief in Omaha and Anchorage."[51]

Moreover, as illustrated in Attachments D1, D2 and D3, many of the zip codes where Qwest is subject to the most competition in the Business Market, i.e., the Medium Business market, are within the same Qwest wire centers which would be declared as "unimpaired" under the proposal of Qwest and the Joint CLECs[52] in the TRRO proceeding currently before the Arizona Commission.

Moreover, the degree of competition provided by Cox when determining whether forbearance from 251(c) is appropriate, must be balanced against Cox's reliance upon the sub-loop in the Phoenix MSA to provide service to multi-tenant environments (MTEs). The Commission, in its *Inside Wire Order*, took steps to ensure that the pro-competition goals of the *96 Act* were realized for residents in MTEs[53]. The Commission stated that:

> "New entrants to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings based on regulatory technicalities or costly and inefficient industry practices. By removing these obstacles, we further the opportunities for consumers living in multi-unit buildings to enjoy the social and economic benefits of communication services competition."[54]

While none of the carriers that provided information identified a specific number of residential MTEs in the Phoenix MSA, the Arizona Commission believes that there may be in excess of 4,000 unique MTE complexes within the MSA. Residents in these

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[51] *Id.*

[52] *Application by Joint CLECs re TRRO and Commission approval of Non-Impaired Wire Center List*; T-03632A-06-0091; T-03267A-06-0091; T-04302A-06-0091; T-03406A-06-0091; T-03432A-06-0091 and T-01051B-06-0091.

[53] In the Matter of *Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, *Clarification of the commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop*, WC Docket No. 01-338, FCC 07-111, (rel. June 8, 2007), ("*Inside Wire Order*").

[54] Id. Para. 3.

MTEs, for the most part[55], have a choice between Qwest and Cox for their telecommunications services. But for Cox to be a viable alternative to Qwest to developments in which Qwest owns the inside wire, Cox is dependent upon Qwest's sub-loop facilities. In its Initial Comments, Cox stated in this regard:

> "Access to inside wire subloops is important in the Phoenix MSA because a large proportion of potential customers live and work in apartments and on office campuses. Cox makes extensive use of inside wire subloops to reach MTE customers. Without access to these facilities, Cox's ability to serve as many as [confidential****] of its current telephone subscribers in the MSA would be impaired significantly.
> Cox already has faced resistance from Qwest in its use of inside wire subloops in Phoenix. ....Forbearance form inside wire subloop obligations likely would foreclose further competition in MTEs, contrary to the commission's oft-expressed policies."[56]

In early 2006, Qwest filed a Formal Complaint[57] against Cox alleging, in part, that Cox was making use of Qwest subloops and not compensating Qwest for such use consistent with an Interconnection Agreement between the two companies. In addition the Complaint alleged that Cox technicians were routinely damaging Qwest facilities when gaining access to new Cox customers. This matter has not yet gone to hearing so no information can be provided to the Commission about what the Arizona Commission's ultimate decision may be.[58]

In data provided to the Arizona Commission in the *State Generic Competition Docket*[59], Cox stated:

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[55] It is the Arizona Commission's understanding that there are instances where, due to a preferred provider agreement with a MTE owner, the non-preferred carrier may determine that a business case cannot be made for competing at the MTE.
[56] Cox Comments at p. 22.
[57] *In the Matter of the QWEST CORPORATION, Complainant v. COX ARIZONA TELECOM, LLC, Respondent*, Docket Nos. T-01051B-06-0045 and T-03471A-06-0045, ("*Qwest Complaint*" or "Complaint").
[58] The Arizona Commission was recently notified by Qwest that it had reached a settlement with Cox in the Complaint Docket. That settlement, however, will be subject to Arizona Commission review and approval. The settlement has not yet been submitted to the Arizona Commission.
[59] *In the Matter of Generic Investigation of Competition in Arizona Telecom Markets*, Docket No. T-00000I-04-0749.

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Thus, even though Cox has built its own cable based network that overlays much of Qwest's network within the MSA, Cox is still dependent upon Qwest provided unbundled network elements ("UNEs") at cost-based prices to provide service to a large segment of its residential customers. Interestingly enough, Qwest does not specifically address subloop in its Phoenix *Forbearance Petition*[60]. In fact, in relation to Cox, Qwest is misleading in the *Forbearance Petition* when it states "... Cox now provides Digital Telephone service to at least 370,000 homes in that MSA, **without relying on Qwest's loops** or transport."[61] (emphasis added) and omits any reference to the use of Qwest subloops by Cox in the provision of telephone service at MTEs.

In support of the pro-competition goals of the *96 Act*, the Arizona Commission would encourage the Commission to separately evaluate loops and subloops, particularly with respect to Residential Mass Market in MTEs, as it considers the forbearance which Qwest is requesting in the Phoenix MSA. Absent specific information that competitive LECs have deployed alternatives to Qwest subloops in MTEs, and are, in fact, successfully competing using such facilities, it is not clear to the Arizona Commission that any forbearance relief to Qwest from the obligation to provide this UNE element would continue the development of, or enhance, local competition.

F. Forbearance from Transport Unbundling Required Under Section 251(c) Does Not Meet the Three Prong Test and is Not in the Public Interest

While the Arizona Commission collected considerable data, the data received in the State *Generic Competition Docket* was not of sufficient granularity for the Arizona Commission to reach definitive conclusions regarding the extent that wholesale alternatives to Qwest provided transport exists ubiquitously throughout the Phoenix

[60] *See* Forbearance Petition.
[61] *See* Forbearance Petition at page 8.

MSA. The Arizona Commission was able to determine that certain competitive ILECs are providing wholesale transport to other carriers, and that certain entities are providing access to dark fiber. However, specific points of interconnection between carriers for these wholesale services were not available for analysis. It is this type of granular data that should be provided to the Commission by Qwest as part of its Forbearance Petition.

Qwest's Forbearance Petition lacks factual transport data to support the statutory relief being requested. The Petition's attached Declarations and Exhibits primarily comprise tariff pages, marketing assertions, national statistics and other generalized descriptions.[62] The Arizona Commission believes that before forbearance is granted with respect to transport Qwest must; 1) factually demonstrate that multiple strong, facilities-based alternative wholesale providers exist; 2) that the carriers provide ubiquitous service throughout the MSA and; 3) that these carriers have attained sufficient market share to restrain Qwest's market power and its ability to increase prices at will. Absent such a demonstration by Qwest, the Arizona Commission continues to believe, as previously stated, that reliance on the criteria of the *TRRO* in providing relief from In its Initial Comments, The Arizona Commission noted that the *TRRO*[63] already provides effective mechanisms for Qwest to seek additional non-impaired wire center designations. The *TRRO* process utilizes fact-based criteria and provides for the lifting of Section 251(c) unbundling requirements as competitive alternatives evolve. The Arizona Commission continues to believe that the Public Interest is best served by synergies in this Forbearance proceeding and the *TRRO* proceeding.

The *TRRO* has not been fully implemented in Arizona at this time although the Arizona Commission will be considering the facts in the Docket[64] now pending before it

[62] For example, refer to paragraph 49 regarding Covad in the Declaration of Robert H. Brigham and David L. Teitzel.

[63] Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. February 4, 2005) ("TRRO").

[64] *In the Matter of the Application of Dieca Communications dba Covad Communications Company, Eschelon Telecom of Arizona, Inc., McleodUSA Telecommunications Services, Inc., XO Communications Services, Inc. and Qwest Corporation Request for Commission Process to Address Key UNE Issues Arising*

and making its determination after a hearing and briefing on the matter. However, the initial list of wire centers resulting as part of the settlement in that case, and subsequent Qwest proposed additions, is more limited than the relief Qwest requests in the Phoenix *Forbearance Petition.*

Initial List[65]

Wire Center	Tier	Non-impaired Elements
McClintock	Tier 1	DS1 and DS3 Transport
Mesa	Tier 2	DS3 Transport
Phoenix East	Tier 1	DS1 and DS3 Transport
Phoenix Main	Tier 1, DS3	DS1 and DS3 Transport; DS3 Loops
Phoenix North	Tier 1, DS3	DS1 and DS3 Transport; DS3 Loops
Phoenix NE	Tier 1	DS1 and DS3 Transport
Scottsdale Main	Tier 2	DS3 Transport
Tempe	Tier 1, DS3	DS1 and DS3 Transport; DS3 Loops
Thunderbird	Tier 1	DS1 and DS3 Transport

Forbearance Petition Proposed Additions

Wire Center	Tier	Non-impaired Elements
Chandler Main	Tier 2	DS3 Transport and Dark Fiber
Chandler West	Tier 2	DS3 Transport and Dark Fiber
Phoenix Cactus	Tier 2	DS3 Transport and Dark Fiber
Phoenix Greenway	Tier 2	DS3 Transport and Dark Fiber
Phoenix Southeast	Tier 1	DS1 & DS3 Transport & Dark Fiber
Phoenix Sunnyslope	Tier 2	DS3 Transport and Dark Fiber
Phoenix West	Tier 2	DS3 Transport and Dark Fiber
Superstition West	Tier 2	DS3 Transport and Dark Fiber

VII. The Commission's Predictive Judgments in its *Omaha Order* Have Been Undermined by Subsequent Events and Are No Longer Reasonable for Application to the Phoenix MSA Wire Centers.

An agency's predictive judgment about areas that are within the agency's field of discretion and expertise are permissible and entitled to particularly deferential judicial

from Triennial Review Remand Order, Including Approval of Qwest Wire Center Lists, Docket No. T-01051B-06-0091 et al, ("*State TRRO*").

[65] Excludes Tucson which is not in the Phoenix MSA.

review, as long as they are reasonable.[66] In reviewing the Commission's prior forbearance decisions, the Courts have noted at varying times that it was appropriate for the Commission to rely upon its expertise and make predictive judgments about the results of its actions. Post Omaha events, however, strongly suggest that reliance upon the same predictive judgments is not appropriate.

Several critical predictive judgments were made by the Commission in the *Omaha Order* which formed the basis for its forbearance determinations particularly in the area Section 251(c) have been severely undermined by subsequent events.

McLeodUSA's Petition[67] for Modification and the Comments of other CLECs that have been adversely affected by the forbearance granted in the Omaha market are some of the events that undermine some key predictive judgments made by the FCC in the *Omaha Order*. Consequently, the actual experiences of these CLECs need to be evaluated by the Commission before any further grants of forbearance are given with respect to Section 251(c) loop and transport obligations.

For instance, one of the predictive judgments relied upon by the Commission in the *Omaha Order* in finding that the first prong[68] of the Forbearance Test was met was the following conclusion:

> "The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little to no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest. This gives us enormous comfort that in the mass market, unbundling loops and transport pursuant to section 251(c)(3) is 'not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

[66] *In Re Core Communications*, 455 F.3d 267 (2006). *See also, Cellnet Communications v. FCC*, 149 F.3d 429 (1998)("If the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunsetting provision in accordance with its continuing obligation to practice reasoned decision-making. See, e.g., Aeronautical Radio, 928 F.2d at 445).

[67] See, *Petition for Modification of McLeodUSA Telecommunications Services, Inc.*, WC Docket. No. 04-223, dated July 23, 2007.

[68] The first prong of the forbearance test is: enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory.

> telecommunications carrier or telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory."[69]

The Commission also relied upon the analysis under the first prong of the forbearance test to find that the second prong of the test had been met in the *Omaha Order*.[70]

Finally, the Commission also made a host of predictive judgments in finding that the third prong of the forbearance test was met in the *Omaha Order*:

> "79. We make a predictive judgment, based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0-, Ds1-, or DS3-cpapcity facilities. We thus reject arguments that our decision today will strand competitive carriers' investments by denying those competitors the opportunity to use their own existing facilities in conjunction with Qwest facilities that cannot economically be duplicated.
>
> 80. To begin with, we note that a withdrawal of these loop and transport offerings would be impermissible under section 271, which requires Qwest to make its loop and transport facilities (among others) available to competitors at just and reasonable rates and terms. In addition, Qwest offers similar special access services pursuant to tariffing or contract filing requirements, and cannot cease offering such services to customers without authority under section 214.
>
> 81. Moreover, given Cox's ability to absorb customers without any reliance on Qwest's local exchange facilities, Qwest will be subject to very strong market incentives to ensure that its network is used to optimal capacity – irrespective of any legal mandate that it do so. Faced with aggressive 'off-net' competition from Cox, we predict that Qwest will endeavor to maximize use of its existing local exchange network, providing service at retail and at wholesale, in order to minimize revenue losses resulting from customer defections to Cox's service. In short, Qwest will prefer that a customer be served by a wireline competitor using Qwest's facilities at wholesale rates above that customer's use of Cox's network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs.
>
> 82. Indeed, our experience indicates that this is precisely what has happened in the past: When the D.C. Circuit called into

[69] *Omaha Order* at para. 67.

[70] The second prong of the forbearance test is: enforcement of the regulation is not necessary for the protection of consumers.

> question the commission's rules requiring incumbent LECs to unbundled mass market local circuit switching, Qwest responded by introducing a commercial product designed to replace UNE-P – and to keep customers on its network – even in the absence of a legal mandate to do so. Qwest has entered into [REDACTED] commercially negotiated QPP arrangements in the MSA, of which [REDACTED] are in the 9 wire centers where we grant unbundling relief.
>
> 83. Here, too, we predict that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision; in the event it proves too optimistic, we will take appropriate action."

McLeodUSA's Petition demonstrates the following which directly contradicts the validity of the predictive judgments relied upon in the Omaha case. CLECs trying to compete in the nine wire centers in the Omaha MSA have experienced wholesale monthly price increases from Qwest in the range of 30% or more for DS0 stand alone loops. A minimum increase of 86% for DS1 access loops and a 360% increase in associated non-recurring charges for installing DS1 access loops have also been realized by the CLECs. While the cost to install a UNE DS1 loop and cross connect in Nebraska is $136.15; that same loop costs $626.50 to install in one of the nine Omaha wire centers. The monthly recurring charge ("MRC') for a UNE DS1 in Zone 1 increased from $76.42 to a special access rate of $182.22 in that same Omaha wire center. Even at the discounted special access rates, if term and volume commitments are met, the lowest discounted MRC in the affected Omaha wire centers is $145.95. This is a 91% increase over the monthly UNE DS1 Rate. Based on the current state of competition in the nine Omaha MSA wire centers, the ability of CLECs to continue to effectively compete in the Omaha market is questionable.[71]

[71] *See also* Comments of Integra, *In the Matter of the Petition of Verizon for Forbearance*, WC Docket No. 06-172.

VIII. Tariffed Special Access Services or the Availability of Network Elements Under Section 271 are Not Viable Alternatives to the Dedicated Transport UNE

A. Special Access Tariffed Services are Not A Viable Alternative

Viewing or utilizing Special Access as an alternative, as suggested by Qwest, to ILEC provided UNEs and Transport is likely to be a misleading replacement option for many CLECs in the Phoenix MSA. In order for this to be a valid option, pricing protections would have to be put in place.

As McLeodUSA previously indicated in its Petition, Qwest has offered only to replace high-capacity UNEs with Special Access Services from Qwest's FCC Tariff No. 1. Those rates are significantly higher for both recurring and non-recurring charges. Qwest proposes to offer stand alone DS0 loops at rates that are nearly 30% higher than the previous UNE prices for the same network facilities.[72] In regards to DS1 and DS3 loops, Qwest has offered the tariffed "Regional Commitment Program" ("RCP") from its Special Access tariffs. Under the RCP, McLeodUSA would have to comply with term (48 months) and volume commitments throughout the rest of Qwest's operating territory in order to receive a 22% discount off the monthly Special Access rates which at a minimum are already 91% higher than the monthly UNE rate for DS1 circuits in the nine wire centers affected by the *Omaha Forbearance Order*.[73] Under the RCP's contract terms and conditions, McLeodUSA would be locked into a region-wide commitment level for Special Access circuits, which, if not met, would result in monetary penalties such as the loss of the RCP discounts.[74] Additionally, McLeodUSA has also been unsuccessful in its attempts to negotiate wholesale pricing for high capacity facilities in

[72] *Id.*, page 4.
[73] *Id.*, page 11.
[74] *Id.*, page 7.

the affected wire centers that deviates from Qwest's Special Access and RCP pricing.[75] The large increase in pricing and McLeodUSA's inability to negotiate wholesale pricing makes it difficult for McLeodUSA and presumably other CLECs to effectively compete in the Omaha market.

As reiterated in the results of the United States General Accounting Office ("GAO")[76] Report, many large customers needing service in areas with pricing flexibility purchase Dedicated Access Services under contracts that provide additional discounts. However, the GAO found that contracts do not generally affect the differential, and that contracts contain various conditions or termination penalties that competitors argue inhibit customer choice. The GAO also found that rates for Special Access Services designated by Qwest as a competitive alternative have generally increased where they are not regulated.[77] In addition, the GAO also indicated that in the sixteen major metropolitan areas it examined, the data suggests that facilities-based competitive alternatives for Dedicated Access are not widely available.[78] The burden of proof that forbearance be granted should be supported by Qwest.

Should the Commission grant partial forbearance in the Phoenix MSA with respect to transport and loops, which the Arizona Commission opposes, the same conditions of forbearance imposing pricing protections set forth as a result of the *Omaha Order* and *Anchorage Order*[79], should be considered. In particular, implementing a cap

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[75] *Id.*, page 5.
[76] GAO: *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Dated November 2006 (GAO Report).
[77] See, Opposition of Affinity Telecom, Inc., Cavalier Telephone, LLC, CP Telecom, Inc., GlobalCom, Inc., McLeodUSA Telecommunications Services, Inc., Integra Telecom, Inc., and TDS Metrocom, LLC, WC Docket No. 07-97, August 31, 2007, page 55.
[78] *GAO Report.*
[79] *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its*

on the current levels of Qwest's Special Access and end-user rate elements at a benchmark that applies to all of its competitors would be similar to what was applied to Switched Access in Anchorage.[80]

Given the limitations of competitive findings with respect to price elasticity of demand and the elasticity of supply for Special Access the data indicates that there is insufficient competition for retail or wholesale enterprise services.[81] In the Phoenix MSA, as in Anchorage, existing competitors are dependent upon the ILEC for Special Access, and it is uneconomical for CLECs to reach many customer locations in the Phoenix MSA without Special Access Services from Qwest

Qwest also has a price cap plan at the state level. Of particular importance to this proceeding is the combined treatment of Special Access under both plans, and the impact of forbearance upon Special Access pricing at the federal level. The competitiveness of the Special Access pricing was an issue in the most recent Arizona Commission review of Qwest's Arizona Price Cap Plan. In that proceeding, competitive local exchange carriers filed testimony which indicated that they had a concern related to the rates for the service.

Time Warner Telecom of Arizona, LLC ("TWTC's") primary interest in the review of Qwest's Arizona Price Cap Plan was the Special Access rates for Private Line Services. TWTC stated that it purchases Special Access when it is unable to obtain access to a commercial building or cannot obtain access on reasonable terms and

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Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, WC Docket No. 06-109; Commission, FCC 07-149; Memorandum Opinion and Order; Adopted: August 20, 2007; Released: August 20, 2007, ("*Anchorage Order*").

[80] *Id.*, Para. 5.

[81] Id., Para. 53 - 54.

conditions. Although TWTC stated it would prefer to use its own facilities, when such access is not available, being able to obtain Special Access on more reasonable terms will bring competition to these commercial buildings. TWTC initially asked that all intrastate rates for Special Access be reduced closer to cost. TWTC also noted that some building owners simply deny entry, while others demand terms and conditions which make provision of its services to tenants either uneconomic or untenable. TWTC also asserted that Qwest retains its historic position in which building owners provide Qwest entry free of charge and with no material restrictions or conditions. [82]

XO Communications Services, Inc. ("XO") provides competitive local exchange services (including Switched and Dedicated Access Services), intraLATA toll services and intrastate interexchange telecommunications services to small and medium sized businesses in Arizona. In its testimony, XO indicated that it relies on DS1 and DS3 products to serve Arizona customers and, in almost all instances, these services are available only from Qwest. XO believes that Qwest has the ability to increase the Special Access rates substantially, and has done so at the federal level.[83]

1.Current Ar izona Price Cap Treatment of Special Access

Under the terms of the current Arizona Qwest Price Cap Plan, Special Access Service (which includes DS1 and DS3 circuits) is included in Basket 3: Flexibly-Priced Competitive Services. Prices for service in Basket 3 are allowed to increase or decrease by any amount as long as the overall net revenue increase from price changes do not exceed $43.8 million minus any amount less than $13.8 million that is recovered from Basket 2: Limited Pricing Flexibility Retail Services on an annual basis

[82] Brian Thomas testimony in support of the Settlement Agreement pages 4 - 5.
[83] Testimony of Rex Knowles supporting the Settlement Agreement.

Following is a list of Private Line Transport/Special Access Services included in Basket 3 Services that are relevant to this forbearance proceeding.

BASKET	SERVICE
3	FOREIGN CENTRAL OFFICE SERVICE
3	FOREIGN EXCHANGE SERVICE
3	INDIVIDUAL CASE ISDN SERVICE
3	INTEGRATED T-1 SERVICE
3	LOCAL AREA DATA SERVICE(LADS)
3	LOW-SPEED DATA SERVICE
3	MARKET EXPANSION LINE(MEL) SERVICE
3	MEGABIT SERVICES
3	PRIMARY RATE SERVICE
3	U S WEST DS1 SERVICE
3	U S WEST DS3 SERVICE
3	VOICE GRADE SERVICE

2.The Arizona Agreement

During the negotiations, Qwest agreed to provide, under the conditions of its Competitive Private Line Transport Services Tariff, a custom offer of intrastate DS1 service that meets the specific needs of Parties to the Agreement[84]. The offer, which is a component of the Commission-approved Settlement Agreement, allows the Parties to the Settlement Agreement, and other similarly situated carriers, a three-year volume-commitment arrangement at discounted prices.[85] The offer provides volume discounts for DS1 circuits as follows:

Channel Termination and Transport Mileage Charges.

	Monthly Recurring Charges			
	1 to 5 circuits at the same customer location	6 to 12 circuits at the same customer location	13 to 18 circuits at the same customer location	19+ circuits at the same customer location

[84] Qwest Corporation, the Arizona Corporation Commission Utilities Division Staff, the Department of Defense and All Other Federal Executive Agencies, the regulated subsidiaries of MCI, Inc., Time Warner Telecom of Arizona, LLC, the Arizona Utility Investors Association, Cox Arizona Telcom, LLC, XO Communications Services, Inc.

[85] Jerrold L. Thompson testimony in support of the settlement agreement, page 10.

Channel Termination Initial and Subsequent. Per termination	$108.00	$108.00	$108.00	$108.00
0-8 mileage band – fixed	$120.00	$114.00	$111.00	$108.00
0-8 mileage band – per mile	$11.00.00	$10.45	$10.18	$9.90
8-25 mileage band – fixed	$170.00	$161.50	$157.25	$153.00
8-25 mileage band - per mile	$15.00	$14.25	$13.88	$13.50
25-50 mileage band – fixed	$220.00	$209.00	$203.50	$198.00
25-50 mileage band – per mile	$17.00	$16.15	$15.73	$15.30
50+ mileage band – fixed	$220.00	$209.00	$203.50	$198.00
50+ mileage band – per mile	$17.00	$16.15	$15.73	$15.30

TWTC and XO supported the Settlement Agreement. TWTC argued the reduction in rates for channel termination will make it more cost effective to access customers in commercial office buildings and will result in greater choices for consumers.[86] TWTC stated that the resolution of rates for Intrastate Special Access DS1s provide benefits from increased competition in the State of Arizona in cases in which tenants seek alternate providers to Qwest, but are precluded from purchasing service due to unreasonable building entry conditions. For these reasons, TWTC supported adoption of the Settlement Agreement by the Commission.[87]

XO relies on DS1 and DS3 products to serve Arizona customers and indicated that in almost all instances, these products are available only from Qwest. Since XO believes that Qwest has the ability to increase Special Access rates substantially, and has done so at the federal level in recent months, XO stated that the contract offer of Intrastate DS1 service will make a DS1 channel termination rate that is more favorable

[86] Decision No. 68604, page 21.
[87] Brian Thomas testimony in support of the settlement agreement page 6.